No. 3969

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEW JERSEY INSURANCE COMPANY, a corporation,

Plaintiff in Error,

vs.

C. W. YOUNG,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

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ARGUMENT

The Transcript of Record herein contains the opinion of the Trial Court (Transcript, Pages 55-60), wherein the questions presented by this case are carefully considered and discussed. Necessarily this brief is, to a large extent, a repetition of matters set forth in the opinion of the Trial Court. We have, however, thought it advisable to file a Brief and, to add to the opinion of the Trial Court, such further argument and citations of authority as seem pertinent.

The case presents three questions:

1. Is the Earth an "object" within the meaning of the collision clause of the policy in question?

2. Is the violent striking of the car against the earth, due to the forward motion of the car upon the

road, a "collision" within the meaning of the collision clause of the policy?

3. The collision, being the immediate cause of the damage to the automobile, can the insurer avoid liability by merely showing that the collision was caused by the breaking of the axle?

We shall discuss these questions in the order in which they are stated.

I.

IS THE EARTH AN "OBJECT" WITHIN THE MEANING OF THE COLLISION CLAUSE OF THE POLICY IN QUESTION?

Obviously, the earth is an "object" within the ordinary meaning of that term. The word "object" is defined as "anything which comes before or in the way of the conscious mind through the senses; especially, anything tangible or visible."

Standard Dictionary.

But it will be argued that the word "object" as used in the collision clause of defendant's policy, should take a restricted definition by reason of the words preceding it; and that the doctrine of Ejusdem Generis should be applied. The Doctrine of Ejusdem Generis was applied to a collision clause similar to the one here under consideration in the case of:

Wettengel vs. United States "Lloyds" 157 Wisconsin 433, 147 N. W. 360, Ann. Cas. 1915 A., 626.

But that case was expressly overruled by the same court in

Bell vs. American Insurance Co., 181 N. W. 733, 14 A.L.R. 179.

when the question next came before it.

In the latter case the court said:

"It was held in Wettengel v. United States "Lloyds," 157 Wis. 433, 147 N. W. 360, Ann. Cas. 1915A, 626, that the language of this policy provision did not cover the damages resulting to an automobile by its running off the main road and down a bank into a river. In that case the doctrine ejusdem generis was applied to the words "automobile, vehicle, or object," and it was held that, to entitle plaintiff to recover, the collision must have occurred with another automobile, vehicle, or some similar object. If the doctrine of that case is to be followed, the judgment must be for the defendant. It is urged by the appellant that the application of the doctrine ejusdem generis was unnecessary to the conclusion there reached, and that it was inadvertently applied and has no proper application to the words as used in the policy before us. It is pointed out that the doctrine of ejusdem generis does not apply when the specific words embrace all objects of their class, so that the general words must bear a different meaning from the specific words or be meaningless; that an automobile is a vehicle, and the terms "vehicle" includes everything in which persons or things can be carried or transported; hence, the words "automobile" and "vehicle" embrace all objects of their class, and the word "object" means a different kind of an object or it means nothing.

"By the rule of construction known as ejusdem generis, general words following particular words are limited to other species of the same genus. "The particular words are presumed to describe certain species, and the general words to be used for the purpose of including other species of the same genus The rule is based on the obvious reason that, if the legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes." 36 Cyc. 1120. It has been held that the rule does not apply where the specific words embrace all objects of their

class, so that the general words must bear a different meaning from the specific words, or be meaningless. United States Cement Co. v. Cooper, 172 Ind. 599, 88 N. E. 69. We think the reason supporting the rule also dictates the exception, and that the exception applies to the words of this policy provision. Unless the word "object", as here used, be construed as including an object of a different class, it is meaningless, as the term "vehicle", it seems to us, includes every species within the genus. We are disposed to construe this provision as sufficiently broad to include a collision with objects other than automobiles or vehicles, and withdraw the contrary intimation made in Wettengel v. United States "Lloyds", supra. This requires us to determine whether the forcible contact of the automobile with the ground, as a result of the upset, constitutes a collision."

14 A. L. R. 181, Bell vs. American Insurance Company, Supra.

The following cases are to the same effect:

Harris vs. American Casualty Co., 83 N. J. Law, 641; 44 L.R.A. (N.S.) 70, 85 Atlantic 194, Ann. Cas. 1914B, 846

Rouse vs. St. Paul F. & M. Insurance Co., 203 Mo. App. 603, 219 S. W. 688.

Southern Casualty Co. vs. Johnson, 207 Pac. (Ariz.) 987.

Universal Service Co. vs. American Insurance Co. of Newark, N. J., 181 N. W. (Mich.) 1007. 14 A.L.R. 183 and Note to above case.

That the doctrine of ejusdem generis should not be applied to the word "object" as used in the collision clause here in question, is further indicated by the provisions of the collision clause expressly "excluding (1) loss or damage to any tire due to puncture, cut,

gash, blowout, or other *ordinary* tire trouble." In ordinary experiences, punctures, cuts, gashes and blow-outs are due usually to contact with the road or things that lie in the road or constitute a part of the road, such as tacks, glass, sharp rocks, nails, ruts, curbing, et cetera: and the fact that the defendant took the pains to expressly exclude from the policy of insurance any damage due to such causes, indicates its own view, that otherwise such damage, which is "*ordinary* tire trouble," would be within the protection of the policy. The express exclusion of loss or damage due to "puncture, cuts, gash, blow-out or other *ordinary* tire trouble" precludes the construction which would also exclude from the protection of the policy, loss or damage due to other violent contacts with the road of an extraordinary nature.

It should be noted also that the decision in the case of Harris vs. American Casualty Company, was rendered by the Supreme Court of the Defendant's domicile some seven (7) years prior to the excution of the policy here under consideration. It must be assumed that that decision, in particular, as well as others holding that the earth was an "object" within the meaning of that term as used in a collision clause of the character under consideration, was in the mind of the defendant's counsel, when the collision clause here under consideration was drafted and prepared. Counsel for the defendant company must be held to have used the word "object" in this collision clause in the sense in which it had been defined by the Supreme Court of New Jersey, or else to have intentionally and deliberately

used a word susceptible of more than one construction. Either view leads to the same conclusion; because if defendant in writing its policy selected a word of uncertain meaning, then the court should give, to that word the meaning most favorable to the insured.

2 Elliot on Contracts Sec. 1528; Sec. 7545 Rev. Codes of Montana, 1921.

It should also be noted that the decision in Moblad vs. Western Indemnity Company (Cal. App.) 200 Pac. 750, is not in conflict with the views herein expressed, as to the meaning of the word "object." The decision in Moblad vs. Western Indemnity Company turned, not upon the definition of the word "object", but upon the definition of the word "collision." The District Court of Appeals held that since "none of the *objects* with which said automobile came in contact caused said automobile to leave the roadway, or to go down said embankment, or caused said automobile to over turn," there was no *"collision"* within the meaning of the policy. The Court apparently assumed that the road bed was an *"object"* within the meaning of the policy; but since there was no *extraordinary or violent contact* with the road bed or other surface of the earth, causing the upset, that there was no *collision.*

See also

Southern Casualty Co. vs. Johnson, 207 Pacific (Ariz.) 987.

We therefore, respectfully submit that the surface of the road must be deemed an *object* within the meaning of the collision clause of defendant's policy here under consideration.

II.

IS THE VIOLENT STRIKING OF THE CAR AGAINST THE EARTH, DUE TO ITS FORWARD MOTION UPON THE ROAD A "COLLISION" WITHIN THE MEANING OF THE COLLISION CLAUSE OF THE POLICY?

It can not be questioned but that there was a "collision" here between plaintiff's automobile and the surface of the road, within the meaning of that term as defined by the lexicographers. A collision is the "meeting and mutual striking or clashing of two or more moving bodies, or of a moving body with a stationery one."

Century Dictionary.

"A striking together; violent contact."

Standard Dictionary.

The definitions given by the courts are substantially similar to the definitions of the lexicographers.

"Collision is defined to be a dashing or violently running together. In maritime law "collision" is the act of ships or vessels striking together."

7 Cyc. 302.

"The term "collision" is derived from the Latin "collisio, collidere," to dash together, and may be defined generally as the act of colliding, and dashing or violently running together; injuries from one thing being rubbed or pressed against another; a striking against, as where the object struck is a brick, stone, or other solid substance; a striking together; a striking together or an impact of two bodies, vehicles, or vessels, more commonly the latter; violent contact."

11 C. J. 1011.

"A policy insuring automobiles from damage from the "collisions" of such automobiles with other vehi-

cles or objects means, by the word "collisions" cases of "striking against", vehicles or objects not in motion."

Pope, Legal Definitions, Vol. 1.

In accordance with the definitions above quoted, the courts have generally held that any violent contact between the automobile and another object is a collision within the meaning of that term as used in a collision clause of an insurance policy.

Harris vs. American Causualty Co. 83 N. J. Law, 641, 44 L.R.A. (N.S.) 70, 85 Atlantic 194, Ann. Cas. 1914B, 846.

Universal Service Co. vs. American Insurance Co. 181 N.W. (Mich.) 1007, 14 A.L. R. 183.

Wetherhill vs. Williamsburgh City Fire Insurance Co., 60 Pa. Super. Ct., 37.

Rouse vs. St. Paul F. & M. Insurance Co., 203 Mo. App. 963, 219 S.W. 688.

Sticks vs. Traveler's Indemnity Co., 175 Mo. App. 171, 157 S.W. 870.

Hanvey vs. Georgia L. Insurance Co., 141 Ga. 389, 81 S. E. 206.

Lepman vs. Employ Liability Assurance Corporation, 170 Ill. App. 379.

There is, however, a line of cases which have given a more restricted definition to the word "collision."

Bell vs. American Insurance, Co., 181 N.W. (Wis.) 733., 14 A.L.R. 179.

Moblad vs. Western Indemnity Co., 200 Pac. (Cal. App.) 750.

Hardenburg vs. Employer's Liability Insurance Co., 80 Misc. 522, 141 N. Y. Supp. 502.

The decisions in the cases last mentioned rest upon the argument that the incident causing the damage to the automobile in those cases was spoken of in common

parlance as an "upset" or "tipover"; that there was no violent contact with any object causing the "upset"; and that if it were the purpose to insure against damage resulting from such accident, such words as "upset" and "tip-over", would have been used. It should be noted that in each of these cases, the damage to the car was not in any manner due to violent resistance to its forward motion, or impact or violent contact resulting from forward motion, as is the fact in the case at bar.

It is stipulated here:

> "That while plaintiff was driving the said automobile upon (43) the public highway at the rate of approximately thirty miles per hour, and was crossing a coulee, that the front axle and frame of the car broke and thereupon the broken axle and frame of the car was let down to the earth and plowed into the earth with great force and violence; *that the force and resistence with which the automobile thus met was sufficient to cause the same to pivot and over turn and that the damage resulted therefrom; that the said damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it thus came in contact with the earth after the breaking of the axle,* and that it would not have thus come in contact with the earth if the axle had not broken."
>
> (Record pp 55-56).

It should be noted that the damage to the car resulted from the violent impact and resistance to the forward motion of the car upon the road. So far as the contact between car and object is concerned, it is exactly the same in its nature as if the front axle had struck a protruding stone, the stump of a tree, embank-

ment, or other object sufficiently high to come in contact with the axle, and resist its forward motion. In other words, the collision here is due to a violent resistance to the forward motion of the car, while it was in an upright position.

The case is clearly distinguished from the decisions relied upon by the plaintiff in error, in that in none of these cases was there any violent contact with the earth prior to the tip-over or upset.

In Bell vs. American Insurance Company, 181 N. W. 733, after the driver had practically stopped the car, the wheels of the car settled into the soft ground on the side of the road, and the car tipped over as a result of such settling. There was no violent contact with the earth or any other object prior to, or causing, the tip-over. The court held that this was not a collision.

In Moblad vs. The Western Indemnity Company, the driver of the car swerved to the outer edge of the roadway; the roadway bank gave way, causing the automobile to run down an embankment, and after leaving the roadway to over turn and roll down the side of a mountain. The automobile did not strike or collide with any object upon the embankment or mountain side or roadway prior to the time that it over turned. The court held that this was not a collision.

The reasoning in these cases is expressly disapproved by the Supreme Court of Michigan in Universal Service Company vs. American Insurance Company, 181 N. W. 1007, 14 A.L.R. 183, and the broader meaning of the term "collision" was adopted as the

correct interpretation. We think that the better reason supports the conclusion of the Supreme Court of Michigan in the case last cited. But we call attention to the fact that in neither the Bell case nor the Moblad case was there any violent contact between the automobile and the earth prior to the upset or tip over; whereas in the case at bar, it is the violent contact of the front end of the car with the earth and the earth's resistance to its forward motion that causes the damage to the car, while it is yet upright on the road. The upset in the case at bar, is, itself, the result of the collision; but the *damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met, when it thus came in contact with the earth after the breaking of the axle.*" For this reason the decisions in the cases of Bell vs. American Insurance Company and Moblad vs. Western Indemnity Company are not in point. This distinction is pointed out by the Supreme Court of Arizona, in Southern Casualty Company vs. Johnson, 207 Pacific 987, from which we quote the following:

> "However, an upset or tip-over resulting in damage may itself be caused by a collision, and, where this is true, the insurer is just as liable under an "accidental collision policy", as though the damage had resulted directly from the collision, because the injury to the car is as much due to the collision, though indirectly, as if the upset had not occurred. Even in those policies containing a provision excluding damage resulting from collision, due wholly to or in part to upsets, a recovery cannot be defeated where the upset is the result of a collision. 14 R. C. M. 1274, Harris vs. American Casualty Co., 83 N. J. Law, 641, 85 Atl. 194, 44 L. R. A. (N.S) 70,

Ann. Cas. 1914 B, 846. Such a "policy does not mean that where a collision has first taken place there can be no recovery because as the result of the collision the machine is upset." Babbit on Motor Vehicles "2d Ed. Par. 788; Universal Service Company vs. American Insurancy Co., 213 Mich. 523, 181 N. W. 1007, 14 A.L.R. 183."

207 Pacific 987.

In the case last cited, the trial court having found that the car "ran into the embankment" and therefore, that "the automobile accidently collided with an embankment of the earth" and thereby caused the upset, the judgment in favor of the insured was affirmed.

Since it is agreed in the present case that *"the said damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it came in contact with the earth after the breaking of the axle,"* the whole argument of plaintiff in error that the damage herein was due to upset is without any basis in the facts. This car was damaged and wrecked while it was yet in an upright position. It does not appear that any substantial part of the damage, was due to, or occurred after the car overturned. If the case is not one of collision, what is it? It certainly is not a case where the damage is due to upset, because the damage to the car was done before the upset occurred. It is not even a case of damage resulting from upset, after collision, of the character considered by the court in Southern Casualty Company vs. Johnson, Supra. No substantial part of the damage to this car occurred after the overturn.

Attention is also called to the fact that it is now, and

at the time of the issuance of the policy in question was, the practice of the insurance companies to expressly exclude, from the protection of the policy, damage due to collision with the road bed where such was the intention of the insurer.

> Rouse vs. St. Paul F. & M. Insurance Co., Supra., Stix vs. Traveler's Indemnity Co., 175 Mo. App. 603, 219 S. W. 688. Hardenburg vs. Employer's Liability Assurance Company, 138 N. Y. Supp. 662; Gibson vs. Georgia L. Insurance Co., 17 Ga. App. 43, 86 S. E 335; Harvey vs. G. L. Insurance Co., 141 Ga. 289, 81 S. E. 206.

Likewise it was the practice of insurance companies to exclude, from the risks of the policy, damage due to upsets, where such was the intention of the insurer.

> Harris vs. American Casualty Co., Supra., Stuht vs U. S. F. & G. Co., 154 Pac. (Wash.) 137, Lepman vs. Employer's Liability Assurance Corporation, 170 Ill. App. 379.

It must be assumed that the insurer and its counsel were aware of this practice; and that, if it was their intention to exclude such risks from the policy; an express provision excluding liability for such damage would have been inserted in the policy. Failure to insert such express provision indicates that there was no intention to exclude such risks.

While the plaintiff in error did not insert in this policy any provision expressly excluding damage due to collision with the surface of the road bed; it did, insert an express provision "excluding loss or damage to any tire due to puncture, cut, gash, blowout or other

ordinary tire trouble." This clause is important for two reasons:

First. It indicates the understanding of the insurer that in the absence of such a clause ordinary tire, cuts, gashes, blowouts and other ordinary tire trouble would be within the risks insured against.

Second. The insurer's *express* exclusion of damage due to the *ordinary* contact of the automobile with the road, indicates its intention that all damage due to *extraordinary* and *violent* contact with the road, not expressly excluded, should be within the protection of the policy. To hold otherwise would do violence to the ordinary rules of construction applicable to contracts.

Expressio unius est exclusio alterius.

III.

THE COLLISION, BEING THE IMMEDIATE CAUSE OF THE DAMAGE TO THE AUTOMOBILE, CAN THE INSURER AVOID LIABILITY BY MERELY SHOWING THAT THE COLLISION WAS CAUSED BY THE BREAKING OF THE AXLE?

The collision here was caused by the breaking of the axle. In this respect it does not differ from other collisions. Necessarily all collisions, as well as all other things that happen in this universe, must have a cause. Ordinarily the cause of a collision is due to some defect either in the car, or in the road, or the careless or willful act or ommission of some person; and in every such case it can be said that such defect

or act or ommission was the proximate cause of the damage. If this policy insures only against damage resulting from collisions which are not caused by something else, then it does not, in fact, insure against any thing. We repeat, all collisions are *caused* by something. Necessarily that something is so closely related to the damage that it can be said to be the proximate cause thereof. If the insurer can escape liability merely by showing that the collision was caused by defective mechanism, a defective road bed, the careless or willful act of a third person, or unavoidable accident, then a policy of insurance against damage resulting from collision is a pure delusion. If this be the correct construction of the policy, then the only collisions insured against are those which occur without a cause. There are no such collisions.

This collision was caused by the breaking of the axle. But suppose that it was the steering gear that was defective and as a result thereof, the car became unmanageable, and run into a telegraph pole. In such case the insurer would claim non-liability upon the ground that the collision was caused by the defect in the steering gear. It could do so with just as good grace as it now claims non-liability upon the ground that the collision was due to the breaking of the axle. If while the defendant in error was driving the car upon the public highway, another automobile was recklessly driven into him, the defendant in error would claim that the act of the driver in the other car had caused the collision, and was the proximate cause of the damage. In other words, collisions never occur

without a cause; and necessarily the cause of the collision is so closely related to the damage resulting from the collision, that it can be said to be the proximate cause of such damage.

The policy of insurance, however, "covers..... damage to the automobile ..... *by being in accidental collision.*" It therefore, covers all damage resulting from accidental collision, of every character, and howsoever caused, except as otherwise expressly provided. It does not exclude damage in cases where the collision was caused by breaking of the mechanism or otherwise. It simply covers all "damage to the automobile ..... by being in accidental collision ..... with any ..... object." The plain reading of the policy therefore, forbids the claim of non-liability upon the ground that the collision was caused by the breaking of the axle.

It is not claimed by the plaintiff in error that any other person is responsible for the breaking of the axle, or for the damage resulting from the collision thereby brought about. Most collisions can be ascribed to either the negligence or willful misconduct of someone. In any such case, the owner of the car would have a right of action against the party whose misconduct brought about the collision, and the resulting damage. But this collision differs from the majority of cases, in that no negligence or willful misconduct on the part of any person is shown. Plaintiff, therefore, so far as shown by the facts in this case, has no recovery against any third person. Unless he is

indemnified by the collision clause of the policy, he must, himself, bear the loss resulting from the collision; and take his consolation in the knowledge that since the collision had a cause the insurer is not responsible. Attention is called to the following clause in the policy:

> "If this company shall claim that the loss or damage was *caused* by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the assured for the loss resulting therefrom, and such right shall be assigned to this company by the assured for the loss resulting therefrom, and such right shall be assigned to this company by the assured on receiving such payment."
>
> (Record P. 15.)

This clause can have application only in cases where the "act or neglect" of the party is the proximate cause of the damage. Obviously, the assured could never have a right of recovery against "any person or corporation" unless such act or neglect was the proximate *cause* of the damage to the car. If therefore, there is no liability on the part of the insurer in any case where the act or neglect of a third party in bringing about the collision, is the proximate cause of the damage, the above clause in the policy would have no meaning. It can apply only in cases where the act of some third party was the *proximate* cause of the damage. This clause points out the remedy of the insurer in the case at bar. It should pay the damage resulting from the collision and be subrogated to the right of

the insured, if any he has, to recover from the person whose act or neglect caused the collision.

Of course if the policy had excepted from the risks insured against, damage due to the breaking of the axle, there would be no liability here even though the *breaking* of the axle resulted in a collision which in turn caused the damage. Such is the rule declared by the Montana Statute.

> "Where a peril is *specially excepted* in a contract of insurance, a loss, which would not have occurred but for such peril, is thereby excepted; although the immediate cause of the loss was a peril which was not excepted."
>
> Section 8140 R. C. M.

But the policy under consideration does not specially except from the risks insured against, damage due to the breaking of the axle or any other parts of the mechanism.

The Montana Statute further provides that the *negligence* of the assured or *others* causing the loss, shall not exonerate the insurer.

> *"An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of his agents or others."*
>
> Section 8141 R. C. M.

It therefore follows that under the express provision of the statute even if the collision were chargeable to the negligence of the manufacturer of the car, and the defendant in error had a right of action against the manufacturer for such negligence on the ground that the same was the proximate cause of the collision and

damage to the car, such fact would not exonerate the insurer nor relieve it from liability. Its remedy is to pay the loss and be subrogated to the assured's right of action. Such is also the express provision of the policy above quoted.

The cases cited by plaintiff in error on pages 20 to 27 of its brief have no application to the case at bar. The decisions in these cases are mere discussions and application of the rule "cause proxima, non remota, spectatur." Certainly the learned counsel for the plaintiff in error would not claim that the collision here was the *remote* cause of the damage. It is more immediately connected with the damage than is the breaking of the axle. These general discussions therefore of *proximate* causes as distinguished from the *remote* causes are *wholly inapplicable to this case.*

We, therefore, respectfully submit that there was no error committed by the court herein and that the judgment of the trial court should be affirmed.

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